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FILED '09 MAY 04 15:34 USDC-ORE

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

GOMBERG KITE PRODUCTIONS
INTERNATIONAL, INC.,
an Oregon corporation,
Plaintiff,

v.

SEAN BEAVER,
an individual residing in the State
of Missouri,
Defendant.

CIVIL NO. 09-6123-AA

VERIFIED COMPLAINT FOR
COPYRIGHT INFRINGEMENT;
EXHIBITS

Jury Trial Requested

COMPLAINT

Plaintiff Gomberg Kite Productions International, Inc. ("GKPI"), by and
through its attorneys, alleges against Defendant Sean Beaver ("Beaver") as
follows:

600004301

THE PARTIES

1.

GKPI is, and at all relevant times was, an Oregon Corporation with its principal place of business in the County of Lincoln at 7200 NE Highland Road, Otis, Oregon 97368.

2.

On information and belief, Beaver is a resident of Blue Springs, Jackson County, Missouri, residing at 22807 SW Woods Chapel Road, Blue Springs, Missouri 64015.

JURISDICTION AND VENUE

3.

This action is brought under the Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.* for copyright infringement in violation of the United States Copyright Law, 17 U.S.C. § 501.

4.

This Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

5.

Venue in this judicial district is proper pursuant to 28 U.S.C. §§ 1391(b)(2) and 1400(a).

6.

This Court has specific personal jurisdiction over Beaver because, on information and belief, Beaver has purposefully availed himself to the privileges of conducting activities in Oregon and the instant copyright infringement claim results from Beaver's forum related activities and injury to parties in Oregon.

BACKGROUND

7.

For approximately 30 years, Peter Lynn (hereinafter "Lynn") of Ashburton, New Zealand created kite sculptures. Lynn's kite sculptures are original works of sculptural art containing copyrightable subject matter for which copyright protection exists under both the Copyright Act, 17 U.S.C. § 101, *et. seq.* and the New Zealand copyright laws.

8.

Lynn is the author of an original work of authorship fixed in a tangible medium of expression, created on or about January 1, 1989 and known as the Inflatable Octopus Kite Sculpture ("The Work"). Exhibit 1.

9.

On or about March 1989, Lynn, who was then and is a citizen of New Zealand, first published The Work in New Zealand, a Member State of the World

Intellectual Property Organization and a State who has acceded to the Berne Convention for the Protection of Literary and Artistic Works.

10.

Under New Zealand copyright law, Lynn's copyright in The Work came into existence automatically when he first put his work into material form.

11.

Lynn created The Work as an original work of authorship fixed in a tangible medium of expression pursuant to 17 U.S.C. § 102(a)(5).

12.

Lynn is the sole author of The Work.

13.

The Work contains substantial amount of material created by Lynn's own skill, labor and judgment.

14.

Registration is not required to secure copyright protection in New Zealand.

15.

Licensed copies of The Work range from approximately 12-120 feet in length and sell for \$3,000.00-8,000.00 (USD).

16.

In compliance with both the United States Copyright Act, 17 U.S.C. § 204 and the New Zealand Copyright Act 1994 § 113, Lynn transferred, by written assignment, the copyright of The Work to GKPI. (Exhibit 2, Assignment of Copyright)

17.

GKPI is the legal owner of the copyright and has standing to enforce the copyright of The Work.

18.

GKPI is the exclusively licensed North American distributor of The Work.

19.

On or about April 13, 2009, GKPI complied in all respects with the United States Copyright Act of 1976 and all other laws governing copyright, by applying for copyright registration by submitting the application and paying the fee.

20.

Since 1990, GKPI has attended hundreds of events and invested tens of thousands of dollars promoting The Work.

21.

GKPI sold numerous copies of The Work.

COUNT I – COPYRIGHT INFRINGEMENT

22.

GKPI hereby re-alleges and incorporates by reference paragraphs 1-21.

23.

On or about December 16, 2008, Beaver contacted GKPI to ask about a Chinese manufactured copy (“Accused Infringing Product”), whose semblance is strikingly similar to that of The Work, and which retails for approximately \$1,200.00 (USD). (Exhibit 3, Accused Infringing Product).

24.

GKPI expressly advised Beaver not to purchase the Accused Infringing Product.

25.

On information and belief, Beaver has knowingly purchased an Accused Infringing Product. (**Exhibit 4**, Images of the Accused Infringing Product viewable by the public, BerryGoodVideo.com posting)

26.

On information and belief, Beaver has knowingly orchestrated a group purchase of five (5) copies of the Accused Infringing Product for himself and others.

27.

On information and belief, Beaver purchased and imported into the United States the Accused Infringing Product.

28.

A copy of The Work is shown in Exhibit 1. A copy of the Accused Infringing Product is shown in Exhibit 3.

29.

The Accused Infringing Product is strikingly similar to The Work.

30.

The Accused Infringing Product is a copy of The Work.

31.

On information and belief, Beaver directly infringed the copyrighted work by displaying the Accused Infringing Product, an unauthorized copy of The Work, and by publicly posting video footage of the Accused Infringing Product, on YouTube™ without authorization in violation of 17 U.S.C. §§ 106(5) and 501.

32.

On information and belief, Beaver directly infringed The Work by displaying the Accused Infringing Product, an unauthorized copy of The Work, by flying the Accused Infringing Product publicly, without authorization in violation of 17 U.S.C. §§ 106(5) and 501.

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33.

On information and belief, Beaver has directly infringed copyright of The Work by importing into the United States, without the authority of the owner of the copyright, a copy of The Work that has been acquired outside of the United States in violation of 17 U.S.C §§ 602(a), 106(3) and 501.

34.

On information and belief, Beaver targeted GKPI's market and knowingly imported the Accused Infringing Product.

35.

On information and belief, Beaver contributed to infringement by knowingly importing into the United States the Accused Infringing Product from a Chinese manufacturer who is directly infringing the copyright of The Work.

36.

On information and belief, Beaver contributed to infringement by knowingly importing into the United States the Accused Infringing Product from a Chinese manufacturer who is directly infringing the copyright of The Work by organizing the purchase and importation of five (5) Accused Infringing Products for himself and others.

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37.

Beaver's acts constitute copyright infringement in violation of the exclusive rights of GKPI under 17 U.S.C. § 106.

38.

Beaver willfully infringed the rights of GKPI by importing a copy of The Work acquired outside the United States while having been expressly warned by GKPI that Beaver should not purchase and import the Accused Infringing Product. Beaver willfully infringed the GKPI copyright by displaying an unauthorized copy of The Work publicly.

39.

Beaver willfully infringed the rights of GKPI by aiding others in purchasing unauthorized copies of The Work.

40.

Beaver's copyright infringement caused GKPI to suffer actual damages of not less than \$10,000.00

41.

Beaver's copyright infringement has caused GKPI to incur costs and fees in association with enforcing its right in that Beaver refuses to cease his infringing conduct voluntarily.

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42.

Beaver's copyright infringement has caused and will continue to cause irreparable injury to GKPI unless enjoined by this Court.

43.

GKPI has no other adequate remedy at law.

44.

There is a substantial likelihood that GKPI will succeed on the merits of this action.

PRAYER FOR RELIEF

WHEREFORE, GKPI prays for judgment and relief as follows:

A. That this Court, pursuant to 17 U.S.C. § 502, order Beaver enjoined during the pendency of this action and permanently from infringing the aforementioned copyright of GKPI in any manner, and from publishing, displaying, selling, marketing or otherwise disposing of any copies of The Work.

B. That this Court, pursuant to 17 U.S.C. § 503, order Beaver to deliver to be impounded during the pendency of this action all copies of the Alleged Infringing Product in his possession or in his control.

C. That this Court, pursuant to 17 U.S.C. § 503, order Beaver to disclose to the Court and GKPI all parties to whom he aided in purchasing copies of the Alleged Infringing Product.

D. That this Court, pursuant to 17 U.S.C. § 504(b), order Beaver to pay to GKPI such actual damages as GKPI has sustained in consequence of Beaver's infringement of GKPI's rights in an amount to be determined, but not less than \$10,000.00.

E. That this Court, pursuant to 17 U.S.C. § 504(c), order Beaver to pay to GKPI statutory damages in the sum of \$150,000.00.


F. That this Court, pursuant to 17 U.S.C. § 505, order Beaver to pay to GKPI the full costs and reasonable attorney fees of this action.

G. For such other and further relief as may be just and proper.

JURY DEMAND

GKPI hereby requests a trial by jury of all issues so triable.

DATED: Salem, Oregon, May 4, 2009.

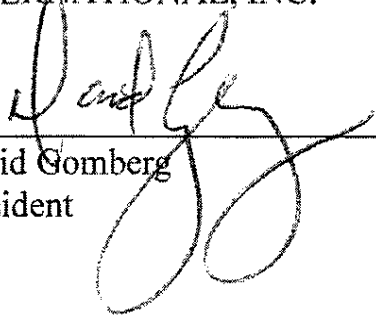


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Attorneys for Plaintiff

VERIFICATION

I, David Gomberg, a citizen and resident of Otis, Oregon, am President and owner of Gomberg Kite Productions International, Inc. I have read the foregoing Verified Complaint against Sean Beaver for claims under the federal Copyright Act. I declare under penalty of perjury under the laws of the United States of America that the allegations of the Verified Complaint are true and correct to the best of my knowledge and belief.

GOMBERG KITE PRODUCTIONS
INTERNATIONAL, INC.



David Gomberg
President

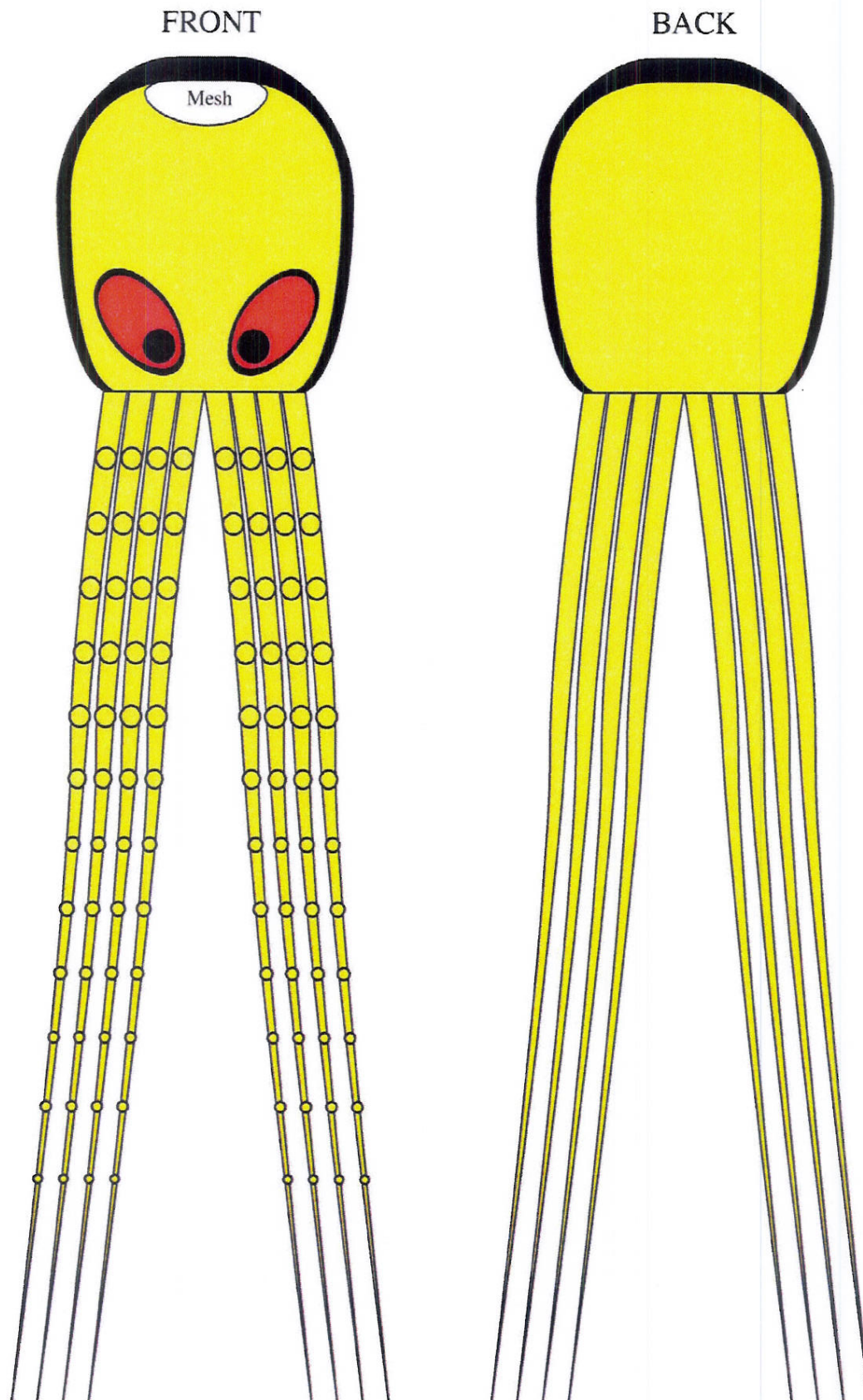




Exhibit 1
Page 2 of 3



ASSIGNMENT OF COPYRIGHT

This Agreement is made between Gomberg Kite Productions International, Inc. ("Assignee"), a corporation duly formed under the laws of the State of Oregon, with a principal address of: 7200 NE Highland Rd., Otis, OR 97368; and Peter Lynn ("Assignor"), whose address is:


105 Alford Forest Rd
ASHBURTON 8300
NEW ZEALAND

Assignor represents and warrants that he is the sole creator and owner of the Inflatable Octopus Kite Sculpture (the "Work") aka Tako Tako and holds the complete and undivided copyright interest to the Work.

For good and valuable consideration and \$10.00 (United States Dollars), receipt and sufficiency of which are hereby acknowledged, Peter Lynn and Gomberg Kite Productions International, Inc. agree as follows:

1. Assignor does hereby sell, assign and transfer to Assignee, its successors and assigns, the entire right, title and interest in and to the United States copyright in the Work and any registrations and copyright applications relating thereto and any renewals and extensions thereof, and in and to all works based upon, derived from, or incorporating the Work, and in and to all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present, or future infringement based on the copyrights, and in and to all rights corresponding to the United States copyright in the Work throughout the world.
2. Assignee agrees to execute all papers and to perform such other proper acts as Assignee may deem necessary to secure for Assignee or its designee the rights herein assigned.

Executed this 29 day of MARCH, 2009 in VUNG TAO VIETNAM


Peter Lynn

Presented by...
BerryGood
VIDEO



*Please give the video a few seconds to load.
If the video stops playing, push pause and wait for it to load before pushing play again.
If no video appears you will need to download Flash Player.*

Visit our website!

http://www.berrygoodvideo.com/video_player.php?c=kckite&v=kckite_1_31_09&s=big [5/4/2009 1:51:04 PM]

Exhibit 3

X-BINDING: md09.embarq.synacor.com
 X_CMAE_Category: 0,0 Undefined,Undefined
 X-CNFS-Analysis: v=1.0 c=1 a=alD5ITfFMtQA:10 a=TJGwg05cQxAA:10
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 smtp.mail=dauidgomberg@vp3.netgate.net; spf=neutral
 X-Originating-IP: [208.205.39.33]
 From: Sean Beaver <seanbeaver@hotmail.com>
 To: David Gomberg <david@gombergkites.com>
 Subject:
 =?big5?B?UkU6IKZezmChRyAgKGh0dHA6Ly93d3cubmV3c2t5a2l0ZS5jb20p?=
 Date: Tue, 23 Dec 2008 09:52:19 -0600
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 C:98.6951)
 X-pstn-settings: 5 (2.0000:2.0000) s CV gt3 gt2 gt1 r p m c
 X-pstn-addresses: from <seanbeaver@hotmail.com> [3905/174]

David,

You have been mis-informed about me "trying to encourage anyone to buy these". First of all I emailed everyone that I know who flies big kites after receiving the email from them and Tony alerted me to it and reading the china email. I emailed everyone to see if anyone had heard of this deal (not to encourage anyone to buy them but **to see if anyone had heard of this stuff.....**) I could care less what others do with there money..... here is what I really said to (I presume Barry is who your referring to) Note my joking tone in the mail....below....like I would ever buy 10...OLO;'s- It was a joke.

All I wanted to do is get feedback if anyone had any (including yours).....all of which weighed in on the issue.

What I did is called first the china company and tried (unsuccessfully) to communicate with them about these offers on there site....then I contacted a friend that I remain in contact with on an in-frequent basis that lives in Wiefang as a english teacher to go by the factory and inspect the kite....Now my buddy has flown a kite or two with me 10 years ago but never big ones and he is no expert but is at the very least able to talk shop with them and tell me if it is a real kite real deal thing....(which at the time I am thinking how the hell can they sell this at such low prices.) It would have to be a international scam.

Anyway, long story short here was the outcome. He went to the factory the guy there gave him two USA references with name, numbers, and email to call to verify this is legit etc. I did. They flew the kite- he took photos etc. said they recently made some changes to there designs from what they told him.....I suspected problems after Linda had sent me that same thread you just did..... so I was aware of it at least. And there are several other threads on not just that forum but several others via technoradi, blog search, and google blog.

The references, small world too cuz one of the references is a guy from a kiteboarding school in florida that I had heard of a while back and he had stated it takes about 10-14 days to get the gear and it went through ok..quality was fair but his kites were trainers not big ones. The other was some lady that bought smaller kites for some kind of show or something in Atlanta last summer. Regardless, I called them- they checked out- verified the process and such.....at least. My friend assisted a bit too but all and all it was a risk - but I went through with a purchase / money transfer etc. Heck it's only 900 bucks- relative to the 4200 -5200 it seemed worth the shot in the while not total dark, still a bit nerve racking..... The way I figure it worse thing that can happen is they took my money.....second - that I get a 900 dollar trash bag. Either way we will see. I will add it to the thread too for others to learn from once we get it. Not to mention the avera! ge person in the crowd (non-kiter) will not know the differences in the kites providing they fly and if I need to modify they I can.

You know I support you David. Referr everyone I know to you. Have your link on my card that I hand out at festivals. In this case I just wanted to test the waters on this stuff. When I want a cadaliac I roll your way. All I am hopefull for in this case though is a Hyundai- low expectations and I think I was a bit intoxicated when we bought it (: You see my other friend who is new to this big kite stuff and I went in together to buy it and spread the risk. We both have little if any expectations.

Curious what is the legal action? Is Peter Lynn sewing these guys. I dont understand that side of it I guess but regardless not for me to worry on. There plans are on the net for anyone to view. Here is a pdf I found today using google **attached. Although I dont speak german.....But you can still order the book this is in off of Amazon and other sites. Too bad I am not a good enough sewer though. But then again mabey he wants you to make them but not re-sell. That would at least make sence to a certain degree. Then again Ford does not publish there plans for there cars. I would suspect GM or someone would copy them. Then again reverse engineering a kite is the process of discovering the technological principles of the kite through analysis of its structure, function and operation. As an Engineer, I assume it often involves taking something (e.g. a kite) apart and analyzing its workings in detail, used in maintenance or to try to make a new kite that doe! s the same thing without copying anything from the original. Reverse engineering has its origins in the analysis of hardware for military advantage as I remember. While that would not apply to kites, the purpose is to deduce design decisions from end products with little or no additional knowledge about the procedures involved in the original production or design. I must constantaly do this with kkites and bridles I get as they need

fixing. But I digress.

Here is my last words on the subject. If the thing gets here and is a outright trash bag I will soak it in gas and lift it with my Peter Lynn Pilot about 450 feet while all the while documenting and video taping the entire thing.. Then I will fire bottle rockets and roman candles at her till we score a direct hit thus creating a nigh fly we wont soon forget. I will send threads and photos out to all to make the case for this crap being nothing more than expensive fireworks that you must attach to a large pilot kite to use. Sorry but I always digress and ramble with the best of em..

Chowder.

2008/12/16 Sean Beaver <seanbeaver@hotmail.com>

Barry,

You ever hear of this China stuff....Competes with Peter Lynn I suppose....Is this for real? Heck at that price (in yellow) I want 10 OLO's

I am ordering one. Click there site and look at the photos.

I know someone that speaks Chinese and is in Weifang as a teacher- I will send him by to flush this stuff out before proceeding.

<http://www.newskykite.com>

> Date: Mon, 22 Dec 2008 17:24:21 -0800
> To: seanbeaver@hotmail.com
> From: David@Gombergkites.com
> Subject: Re: RE: 'G (<http://www.newskykite.com>)
>
> At 01:10 PM 12/16/2008, you wrote:
> >My dad always told me if it sounds too good to be true, it is!
>
>
> Hey Sean!
>
> I just got a call from one of my big kite friends saying he's
> received an email from you encouraging him to buy some of the Chinese
> Octopus. I'm presuming this was the same email you sent to me back on

> the 16th.
>
> I've spoken to the folks in New Zealand and they are disappointed
> that anyone would consider buying a knock-off. They are also
> considering legal action.
>
> Meanwhile check out this thread on the KiteBuilder Forum:
> [http://www.kitebuilder.com/forums/viewtopic.php?t=6999&highlight =](http://www.kitebuilder.com/forums/viewtopic.php?t=6999&highlight=)
>
> Thanks!!
>
&g!
t; David
>
>
>
>

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